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IN THE
SUPREME COURT OF THE UNITED STATES

No. 73-291

OCTOBER TERM, 1973

SPORTS DIVERSIFIED, INC. a corporation, and ROBERT M. MOORE, JR.,
Petitioners,

vs.

NATIONAL BANK OF COMMERCE OF TULSA, OKLAHOMA, CARNES CONSTRUCTION CO., DAVID L. MORGAN, AINSLIE PERRAULT, BUSINESS BUILDERS, INC., BILLIE GERALDINE MOORE, GLENN A. YOUNG, JACK S. ISAMINGER and EMMA WEBB, Administratrix of the Estate of FLOYD C. WEBB, Deceased,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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INDEX

Page

Questions Presented for Review —

1. Are all or any one of the enumerated rulings of which Petitioners complain and which are embodied in the Oklahoma Court decision of a nature to justify the granting of a Writ of Certiorari 4

Argument 4

1. The Directed Verdict Against Petitioner Robert M. Moore, Jr. In The Usury Penalty Suit 5

2. The Refusal Of The Tulsa County And Creek County Courts To Permit Petitioners To Raise As A Defense In The Action On The Note The Forfeiture Of The Interest Not Paid But Reserved 5

3. The Tulsa County Court Granting Judgment For Interest On The Note From The Date Of Suit On The Note At The Contract Rate Of Ten Percent Per Annum 8

4. The Oklahoma Appellate Court's Order To The Trial Court That If Upon Retrial Usury Was Determined That The Penalty Be Set-Off Against The Amount Of The Judgment On The Note 10

5. The Oklahoma Appellate Courts Refusal To Set The Creek County Foreclosure Judgment And Foreclosure Sale Aside 11
   A. Under Oklahoma Law 12
   B. As a practical matter 14

Conclusion 17

TABLE OF CASES CITED

Page

Cases:

John R. Alley v. Federal National Bank, 124 P.2d 995 (10th Cir. 1952) 10, 11

Brown v. Marion National Bank, 169 U.S. 416, 18 S.Ct. 390, 42 L.Ed. 801 9

Chapman v. Tiger, 356 P.2d 571 (Okla. 1960) 7

Dumas v. Conyer, 448 P.2d. 835 (Okla. 1968) ... 8

First National Bank of Millcreek v. Ellis, 27 Okla. 699, 114 Pac. 620 (1911) 6

Hawkins v. McElhanon, 315 P.2d. 667 (Okla. 1957) 9

Hubbard v. Ogden, 22 Kan. 671 (1879) 12

Latson v. McCollom, 192 Okla. 48, 134 P.2d. 130 (Okla.) 1943 3

Magnum Import Co. v. Coty, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 5

McCollum v. Hamilton National Bank of Chattanooga, 303 U.S. 245, 58 S.Ct. 568, 83 L.Ed. 819 11

National Labor Relations Board v. Waterman S.S. Corp. 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704 5

Pritchard v. Madran, 31 Kan. 38, 2 Pac 691 (1884) 13

Shadwick v. Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed. 2d. 783 9

Short v. Chaney, 66 Okla. 258, 168 Pac. 425 (1917) 7

State Insurance Fund v. Thieschmann, 206 Okla. 533, 244 P.2d. 1128 (1952) 9

Page

Thompson v. Thompson, 387 P.2d 281 (Ore. 1963) 13

Tobin v. Holmboe, 172 Okla. 546, 45 P.2d. 716 (1935) 9

Talbot v. Sioux City First National Bank of Iowa, 185 U.S. 172, 22 S.Ct. 612, 46 L.Ed. 857 6

United States v. Johnson, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 5

Wolf v. Weinstein, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed. 2d. 33 5

AUTHORITIES CITED

Annotation 29 L.Ed. 2d 872 5

Reinstatement of Restitution §74, Comment M (1937) 13

29 A.L.R. 1071 at 1082 (1924) 12

33 CJS Executions §301(2)(b) 12

TABLE OF STATUTES CITED

12 O.S. 1971 Ch. 15, App. 3, Rules of Practice and Procedure 4

12 O.S. 1971 §131 2

12 O.S. 1971 §324 11

12 O.S. 1971 §968 3

12A O.S. 1971 §3-415 3

18 O.S. 1971 §1.26 2

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Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondent, National Bank of Commerce, hereby opposes the Petition for Writ of Certiorari to the Oklahoma Supreme Court. The Respondent is satisfied with the matters contained in the Brief of the Petitioners in relation to Opinions Below, Jurisdiction, and Constitutional Provisions, Statutes, and Regulations Involved. Except with respect to the question raised herein by

Respondent as to the propriety in granting the Writ in the first instance, the Respondent is essentially satisfied with the Petitioner's statement of the Questions Presented For Review insofar as they point up the issues. The Respondent is satisfied with the Statement of the Case except for the omission of certain facts which are germane to the state court decision and whether or not there is any merit in reviewing its decision, namely,

1. The Oklahoma Statute denying to a corporation the right to claim or defend on any usury grounds on the basis of which the Tulsa County Court directed a verdict against Sports Diversified on its suit for the usury penalty and struck usury from its defense in the bank's suit on the note had been the codified law in Oklahoma for 25 years. 1/ It was only after the appeals from both the Creek County foreclosure judgment and the Tulsa County judgment on the note had been perfected that the Oklahoma Supreme Court struck the statute down as unconstitutional in a case wholly unrelated to the instant one.

2. It was not possible for the bank to foreclose its mortgage on the land which secured its note in the same action involving the suit on the note as the land was in another county. Under Oklahoma statutory law foreclosure must be instituted in the county where the land is located. 2/

1/ 18 O.S. 1971 §1.26

> "**§1.26 Usury no defense.**--No corporation shall, after this Act becomes effective, plead, directly, or by counter claim, set-off, or otherwise, a defense of usury to any action brought against it to recover damges on, or of any other remedy on, any debt, mortgage, bond, bill of exchange, note or other obligation or liability executed, incurred or effected by such corporation."

2/ 12 O.S. 1971 §131

3. The $275,000 bank loan was made to Sports Diversified only. The record shows that all proceeds from the loan less amounts paid out at the time it was funded were deposited to Sports Diversified's corporate bank account. The other signers on the note were accommodation makers only. [3/]

4. The action by the bank on its note was a counterclaim and not a cross-petition in that the bank, as Defendant sued the Plaintiff.

5. Neither of the Petitioners herein perfected an appeal from the judgment of the Creek County Court foreclosing the bank's mortgage (at that time securing the Tulsa County judgment on the note) and the liens of various other creditors of Petitioners. Moreover, although perfecting an appeal from the Tulsa County court judgment on the note Petitioners elected not to post supersedeas to stay the effectiveness of this judgment, failing which the judgment could be executed and satisfied. [4/] It was this fact that permitted the Creek County court to foreclose the mortgage then securing the judgment into which the note had been merged. [5/]

6. Whether the loan transaction between the Petitioners and the bank was tainted with usury or not, i.e., whether the $8,250.00 "loan fee" paid by Sports Diversified to the bank in addition to the agreed 8% on the note constituted a rate of interest in excess of the 10% per annum legal rate (as contended by the Petitioners) or whether such fee was for a two year ex-

3/ 12A O.S. 1971 §3-415

4/ 12 O.S. 1971 §968

5/ **Latson** v. **McCollom**, 192 Okla. 48, 134 P.2d 130 (Okla) 1943

tension of the note conditioned upon interest and certain annual principal payments and thereby over the agreed term of the loan (3 years) less than 10% per annum (as contended by the bank) has yet to be determined. The "judgment" of the Oklahoma Supreme Court is not final as to this issue.

7. Of all of the parties named in the style of this Application including Respondent lien claimants, Carnes Construction Co., Ainslie Perrault and Business Builders, Inc. whose liens were adjudged inferior to the Bank's note judgment, and including Respondent Jack S. Isaminger, against whom, as guarantor of the Bank's note, the Tulsa County judgment was also entered, only Petitioners completed their appeal through the Oklahoma Supreme Court, by the requisite Petition for Rehearing in the Oklahoma Court of Appeals and subsequent Petition for Certiorari in the Oklahoma Supreme Court for a review of the Court of Appeals decision. 6/

QUESTIONS PRESENTED FOR REVIEW

1. Are all or any one of the enumerated rulings of which Petitioners complain and which are embodied in the Oklahoma Court decision of a nature to justify the granting of a Writ of Certiorari?

ARGUMENT

The case presented by Petitioners is not an appropriate case for the granting of a Writ of Certiorari. The questions either concern themselves with the state court's application and interpretation of state law and not

6/ Title 12 O.S. 1971, Ch. 15, App. 3, Rules of Practice and Procedure in the Court of Appeals and on Certiorari to that Court.

federal questions of substance, *Wolf* v. *Weinstein*, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed. 2d 33; seek a review and reversal of decisions based solely on questions of fact, *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704 and *United States* v. *Johnson*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 or addresses itself to issues of a purely personal and private nature, of no public interest and importance, *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922.

Moreover, every issue on which Petitioners base their application for Writ is predicated upon the assumption that the loan transaction between the Petitioners and the bank was usurious in violation of the Federal Statutes. That issue has yet to be determined by the trial court under the mandate of the Oklahoma Court remanding that issue to the lower court for trial. This court has held that a judgment must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering the judgment. *Annotation* 29 L.Ed. 2d 872. This is not the case. It seems apparent that the instant case stands outside of the perimeters established by this court for exercising its very narrow discretion in granting writs of certiorari.

Petitioners make no claim that the state court procedures of which they availed themselves to protect their interests did not afford them due process. They only complain of unfavorable rulings. We shall hereinafter address our response to each in the order they were numbered and presented in Petitioner's brief.

1. The Directed Verdict Against Petitioner Robert M. Moore, Jr. In the Usury Penalty Suit.

This is an evidentiary issue only, not involving any

misapplication or misinterpretation of Federal law. It was a fact question only as to whether Petitioner Moore had paid any of the interest. Assuming the transaction was usurious, if he did not he was not entitled to recovery of any usury penalty. 7/ In its decision the Oklahoma Court of Appeals upheld the trial court on this evidentiary issue,

> "However, we think the trial court properly directed a verdict against Robert L. Moore, Jr., individually. Usurious interest can be recovered only by the party paying it. 12 USC 1970 §86; 45 Am. Jur. 2d, Interest and Usury 319 (1969). The evidence in this case established that the interest payment came ultimately from corporate funds." (pet. Br. App. A, p. 77-79)

2. The Refusal Of The Tulsa County And Creek County Courts To Permit Petitioners To Raise As A Defense In The Action On The Note The Forfeiture Of The Interest Not Paid But Reserved.

First, with respect to Robert M. Moore, Jr. the individual Petitioner, he was denied nothing because long before the Tulsa County trial on the bank's note took place the counterclaim was dismissed as against Robert M. Moore, Jr. He was not being sued for any of the principal or any of the interest on the note.

Second, with respect to the Creek County District Court's refusal to permit both petitioners to raise the defense of usurious interest forfeiture in the mortgage foreclosure we must point out that the Creek County Court was presented with a judgment into which the

7/ **Talbot** v. **Sioux City First National Bank of Iowa**, 185 U.S. 172. 22 S.Ct. 612. 46 L.Ed. 857. **First National Bank of Mill Creek** v. **Ellis**, 27 Okla. 699, 114 Pac. 620 (1911).

Promissory Note had been merged and in which the same usury issue among the same parties had been ruled upon by the Tulsa County District Court. The Tulsa County judgment was res judicata on this issue. 8/ Moreover, since the Tulsa County judgment was appealed, to have done so would have gone behind the Tulsa County judgment in a prohibited collateral attack on that judgment seeking to affect the rights of the parties while jurisdiction was then exclusively in the Oklahoma Supreme Court. This is not permitted under Oklahoma Law. 9/

Third, with respect to the Petitioner corporation the record clearly demonstrates that it has not been denied its right to claim unpaid interest forfeiture. The Oklahoma Court reversed the judgment on the note conditionally upon a retrial of the usury issue and according to the court's own statement in the event the Petitioners would prevail the amount of the Tulsa County judgment on the note would be adjusted accordingly. 10/ The Court said,

> "Of course, the amount of the interest charged *but unpaid* may be set off or credited against the principal of the note in any event, even under the earlier Federal decisions." (Pet. Br. App. A, p. 78)

* * *

8/ **Chapman** v. **Tiger**, 356 P.2d. 571 (Okla. 1960).

9/ **Short** v. **Chaney**, 66 Okla. 258, 168 Pac. 425 (1917).

10/ The unpaid interest at the 8% rate reserved in the note to October 31, 1967, the date Petitioners filed their action, was $5,225. This amount was included in the Tulsa County judgment.

> "Since the judgment on the note and the order awarding an attorney's fee in Appeal No. 43410, though free from error in themselves, we reverse them conditionally upon a verdict for the plaintiff, Sports Diversified, on the retrial of the usury claim. Otherwise, these orders stand affirmed." (Pet. Br. App. A, p. 79)

Of course, the question of whether the note should be reduced by the amount of interest reserved but unpaid awaits the decision of the trial court, upon the retrial of the usury question.

3. The Tulsa County Court Granting Judgment For Interest On The Note From The Date Of Suit On The Note At The Contract Rate Of Ten Percent Per Annum.

Petitioners contend that this violates Federal law; that only the legal rate can be collected after suit is instituted and that the legal rate in Oklahoma is six (6%) percent per annum.

This issue was never raised by the Petitioners at any level of the proceedings in any court below including the Oklahoma Court of Appeals and Oklahoma Supreme Court. It is not mentioned in any of the pleadings at the trial level, in the Petitions in Error in which the decisions of the trial court were appealed nor in any of the briefs submitted by petitioners. It was raised for the first time in Petitioners oral argument before the Court of Appeals. Apparently, the Oklahoma Court of Appeals adhered to the well settled authority in Oklahoma that appellants are deemed to have waived and abandoned issues not raised at the trial level; [11/] not assigned for

11/ **Dumas** v. **Conyer**, 448 P.2d. 835 (Okla. 1968).

review in the Petition in Error to the Appellate Court; [12] and not briefed as grounds for reversal. [13] This Court agrees. [14]

Assuming, arguendo, that this issue was properly before the Oklahoma court, petitioners are simply wrong in their interpretation of the decision in *Brown* v. *Marion National Bank*, 169 U.S. 416, 18 S.Ct. 390, 42 L.Ed. 801 and its application to the Oklahoma law. A plain reading of the Oklahoma Statutes and constitutional provision (Pet. Br. p. 9) demonstrates that the legal rate of interest in Oklahoma is that rate on which the parties contract not to exceed ten (10%) percent per annum. [15] In the *Marion* case this court referred to usurious interest as "a greater rate of interest than the law allows". The Promissory Note, (Pet. Br. App. B, p. 54) provides that in the event of default, interest on the principal sum would be "at the highest lawful contract rate on the unpaid balance". Under Oklahoma law this is ten (10%) percent and it was this sum of interest from the date that the Counterclaim was instituted on the note that was included in the Tulsa County judgment. Under the *Marion* decision the bank was entitled to interest at this rate from the time it brought suit on the note.

Nevertheless, had the Petitioner corporation raised this issue it would have been a simple matter for the

12/ **State Insurance Fund** v. **Thieschmann**, 206 Okla. 533, 244 P.2d. 1128 (1952).

13/ **Hawkins** v. **McElhanon**, 315 P.2d. 667 (Okla. 1957).

14/ **Shadwick** v. **Tampa**, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed. 2d. 783.

15/ **Tobin** v. **Holmboe**, 172 Okla. 546, 45 P.2d. 716 (1935).

Tulsa County trial court to calculate the difference between the six (6) and ten (10) percent rates. As will become abundantly clear in a later discussion herein, because of the total judgments against Sports Diversified which the land secured, a reduction of the judgment on the note would be meaningless.

Moreover, the question of whether the transaction was usurious in the first instance remains to be determined.

4. The Oklahoma Appellate Court's Order To The Trial Court That If Upon Retrial Usury Was Determined That The Penalty Be Set-Off Against The Amount Of The Judgment On The Note.

Unlike the preceeding proposition which they now raise for the first time, on this proposition petitioners have changed their position for the third time. At the trial level they sought and secured an order separating the trial on the usury penalty from the trial on the note. These trials were accomplished separately. As they admitted, in their appeal they urged that if the usury penalty was awarded them that its amount be set off against the amount of the judgment on the note. Now, contrary to their argument and brief before the Oklahoma Appellate Court on the basis of which they secured a decision which granted the set off, they ask this court, in effect, to reverse the very decision which they sought and got. It is so well settled as to require no citation of authority that this Court, or any appellate court for that matter, will not consider on appeal a theory inconsistent and opposite to that presented to the court below.

As to the merits of this issue, the Court in *John R. Alley* v. *Federal National Bank*, 124 P.2d. 995 (10th Cir. 1952) cited by Petitioners (Pet. Br. p. 64) simply held that

the procedural aspects of the federal usury statute as laid out in *McCollum* v. *Hamilton National Bank of Chattanooga*, 303 U.S. 245, 58 S.Ct. 568, 83 L.Ed. 819 have been amended by the Federal Rules of Civil Procedure. As pointed out by the Court in the *John R. Alley* case the substantive right created by the federal usury statute is the right to recover twice the amount of the usury as a penalty. It was only under former federal procedure prior to the enactment of the Federal Rules that the penalty had to be recovered in a separate action. On the other hand, if, as petitioners argue, the procedure for the collection of the usurious penalty is governed by state law and not federal procedure then the Oklahoma procedural set-off statute [16/] would govern since the Bank brought suit on its note with its answer to the usury claim. The mandate of the appellate court to the trial court recognizes the set off.

Again, all of the above assumes a decision on the usury question yet to be entered.

5. The Oklahoma Appellate Courts Refusal To Set The Creek County Foreclosure Judgment And Foreclosure Sale Aside.

Petitioners complain that the Oklahoma Appellate Court's opinion and directions should have required that in the event of a finding of usury the Creek County court's judgment foreclosure and foreclosure sale confirmation should be set aside.

16/ 12 O.S. 1971 §324. "*Setoffs--Actions for recovery of money.*-- In any action in which a recovery of money is sought a defendant may set off any cause of action for the recovery of money which he has at the time the answer is filed. Where necessary to avoid delay or prejudice, the court may try the setoff separately."

Of course, the validity of the confirmation procedure is a matter of State law based upon the evidence.

The thrust of Petitioners argument is that a reduction of the Tulsa County judgment must necessarily effect a reduction of the Creek County judgment which included it and therefore it would be violative of due process not to set the Creek County judgment and the sale which resulted aside. This is not so for two reasons, first as a matter of State law and second, as a practical matter it does not deprive the Petitioners of anything.

A. Under Oklahoma Law

The decision of the Oklahoma Appellate Court comports with the rule that a *modification* of a judgment does not effect the title of a purchaser at a foreclosure sale. A judgment creditors title is subject to attack where he takes it at judicial sale upon execution and later the original judgment is *reversed.* Both the Oklahoma Statutes with regard to reversal of the judgment after the sale of the land and the Oklahoma cases had their origin in the Kansas law. Kansas case law is in accord. [17/] But there is a well recognized exception to this rule and briefly stated it is that a *modification* of the judgment does not affect the title acquired by the judgment creditor who bids the property in at an execution sale. See 33 CJS *Executions* §301(2)(b) and 29 ALR 1071 at 1082 (1924).

The ALR annotation summarizes the qualification of the judgment creditor title rule thusly:

> "Where the appellant court merely reduces the amount of the judgment, a sale made there-

17/ **Hubbard** v. **Ogden**, 22 Kan. 671 (1879).

> under to the execution plaintiff will not be avoided, if the modification or reversal does not destroy the grounds for the sale, unless there was some unfairness in the sale, or it appears that the property would on resale bring a larger amount." Citing numerous early cases.

The same Kansas case law followed by the Oklahoma Court recognizes this exception. 18/

The reinstatement of restitution recognizes this exception also stating:

> "Where a judgment is modified and a smaller amount awarded to the judgment creditor, if payment has been made, in excess of the amount finally awarded, the judgment debtor is entitled to restitution of the excess under the same circumstances and from the same classes of persons as where the judgment is reversed. If property of the judgment debtor was seized on execution and sold to a purchaser, the purchaser is entitled to retain the property but the creditor is under a duty of restoring any excess received. If the property has been purchased, by the judgment creditor, the sale will not be set aside but the judgment creditor, will be required to restore the excess amount of net proceeds received by him unless such result would be unfair to the judgment debtor." Reinstatement of Restitution §74, Comment M (1937).

The right of the judgment debtor to set aside an execution sale after a *modification as distinguished from the reversal* of a judgment, has never been passed on by the Oklahoma Court; however the acceptance of the above stated exception has been universal and recently affirmed. 19/

18/ **Pritchard** v. **Madran**, 31 Kan. 38, 2 Pac. 691 (1884).

19/ **Thompson** v. **Thompson**, 378 P.2d 281 (Ore. 1963).

B. As a practical matter

Hypothetically let us examine the practical result of a finding of usury in the transaction and give all the credits which Petitioners urge would result.

The Tulsa County Judgment would simply be reconstituted as follows:

Principal	$261,250.00
Attorneys fees	42,500.00
Interest (after suit at 6%)	21,160.81
Costs	202.20
Total	$325,113.01
Less usury penalty	- 49,799.78
	$275,313.23

Before we move on to see what effect, if any, this reduction would have on the Creek County judgment, the Court need be reminded that the Tulsa County judgment in the reduced amount would bear interest from the date of its rendition, April 15, 1969, through and including the date of the Creek County judgment on March 2, 1970, thereby increasing the Bank's judgment by another $26,710.41 (interest at 10% on $261,250 principal and $42,500 attorneys fees for 321 days) for a grand total at the date of the Creek County judgment of $302,023.64. Of course, the judgment computation is only through March 2, 1970. Interest continued to run until the sale on July 22, 1970, when the Bank purchased the land. This interest amounts to another $11,815.82. The Bank's reduced judgment amounted to $313,839.46 on the day of the sale.

Assuming that this was the only sum to be satisfied by the foreclosure of the mortgage the new amount would have no effect on the previously approved Creek County proceedings. The appraisal of the land which the

court approved was $405,000. In satisfaction of its judgment the Bank bid the statutory two-thirds of $275,000 (the Bank sought no deficiency judgment for reasons which later became apparent). So even in its reduced amount and without the introduction at this point of the amounts of the other Creek County judgment liens, some superior and some inferior to that of the Bank's, the statutory bid required was $38,839.46 short of satisfying the Bank's judgment.

Moreover, the Creek County journal entry lists two judgments imposed as liens against the property prior and superior to that of the Bank's. Of course, both of these had to be paid by the Bank before it could realize on its security, i.e., sell the property after the sale was confirmed. Both of these were imposed by the courts in what the Oklahoma Appellate Court referred to as the "abortive" receivership and bankruptcy reorganization proceeding. They totaled $9,512.30 exclusive of interest.

But the Bank's judgment was not the only judgment lien foreclosed against Sports Diversified's property. The others are listed 1 through 7 in the Creek County journal entry. With interest calculated to the date of the Creek County judgment, they, together with the Bank's judgment as corrected, total $491,809.47, calculated as follows:

1. $5,175 Receivers expenses + interest at 10% for 273 days, $384.93	=	$ 5,559.93
2. Bankruptcy reorganization expenses	=	5,086.60
3. The Bank's judgment *as reduced*	=	313,839.46

4. Business Builders, Inc., $613.34 + interest at 6% for 3 years and 92 days, $119.50, + $200 attorney fees	=	932.94
5. Ainslie Perrault, $16,350.00 + interest at 10% for 2 years and 222 days, $4,288.98, + $1,645.00 attorneys fees	=	22,283.98
6. Carnes Construction Co., $77,118.72 + interest at 10% for 2 years and 222 days, $10,764.35, + $7,700.00 attorneys fees	=	95,853.07
7. Receiver's certificates, $45,078.33 + interest at 10% for 273 days, $3,445.26	=	48,523.49
Total		$491,809.47

The total judgments exceed the approved appraisal of the land ($405,000) by $86,809.47.

And finally, if the Creek County proceedings were set aside and the foreclosure sale invalidated, each of the judgment liens would have to be recalculated since none of them have been paid. Interest on each would continue to accrue against the land until another foreclosure sale is ordered at the rate of $131.00 per day. As of October 31, 1973, a full six years after this suit was filed, the total of the judgment liens against the land would be increased by an additional $177,081.00.

Had petitioners been interested in protecting the land from foreclosure sale they could have superseded the Creek County foreclosure judgment. Had the land had anywhere near a value equal to the judgments

against it they could have secured the bond for supersedeas. They did neither.

To set the Creek County sale confirmation aside through a vacation of the Creek County judgment would gain the petitioners nothing and would destroy the title to property sold to third parties three years ago which has long since developed.

Once again, since the usury issue is yet to be determined, there is no final order from which to seek a review in this Court.

CONCLUSION

This Court should deny certiorari and the judgment of the Oklahoma Court of Appeals should be allowed to stand.

Respectfully submitted,

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